STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RASON ANGELO HORTON,

Defendant-Appellant.

UNPUBLISHED
January 18, 2007

No. 264604
Washtenaw Circuit Court
LC No. 04-001501-FC

Before: Murray, P.J., and Fitzgerald and Owens, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions of first-degree felony murder, MCL 750.316(1)(b), possession of a firearm during commission of a felony (felony-firearm), MCL 750.227b(a), felon in possession of a firearm, MCL 750.224f, carjacking, MCL 750.529a, and armed robbery, MCL 750.529. Defendant was sentenced as a second-offense habitual offender, MCL 769.10, to concurrent prison terms of life without parole for the first-degree murder conviction, 25 to 50 years for the armed robbery conviction, 35 to 60 years for the carjacking conviction, three to seven and a half years for the felon in possession of a firearm conviction, and to two consecutive years for the felony-firearm conviction. We affirm.

Defendant first argues he was denied his Fifth Amendment right against self-incrimination when the trial court admitted, over his objection, custodial admissions he made to the police. Defendant also argues that the trial court should have suppressed the statements as involuntarily made. We disagree with both contentions.[1]

A trial court's legal conclusions are reviewed de novo. *People v Medlyn*, 215 Mich App 338, 340; 544 NW2d 759 (1996). A court's ultimate decision regarding a motion to suppress is also reviewed de novo. *People v Davis*, 250 Mich App 357, 362; 649 NW2d 94 (2002). However, the trial court's findings of fact following a suppression hearing will not be disturbed unless they are clearly erroneous. *People v LoCicero*, 453 Mich 496, 500; 556 NW2d 498 (1996). Factual findings are clearly erroneous where, based on review of the whole record, there

[1] While defendant's relevant statement of the question presented also refers to alleged violation of his Sixth Amendment rights, defendant has waived any such claim by failing to brief its merits. *People v McPherson*, 263 Mich App 124, 136; 687 NW2d 370 (2004).

is a firm and definite conviction that the trial court made a mistake. *People v Burrell*, 417 Mich 439, 449; 339 NW2d 403 (1983).

The right against self-incrimination is a right guaranteed by both the United States and Michigan Constitutions. US Const, Am V; Const 1963, art 1, § 17. "[A] suspect in police custody must be informed specifically of the suspect's right to remain silent and to have an attorney present before being questioned." *People v Kowalski*, 230 Mich App 464, 472; 584 NW2d 613 (1998). If a suspect requests an attorney, interrogation must cease until an attorney is present. *Id*. But where a defendant makes only an ambiguous or equivocal reference to an attorney, questioning may continue. *People v Granderson*, 212 Mich App 673, 677-678; 538 NW2d 471 (1995). And a limited request for counsel, such as a request for counsel for answering a specific question, does not limit police from continuing to interrogate a suspect on other topics. *People v Adams*, 245 Mich App 226, 233-234; 627 NW2d 623 (2001).

There were only two witnesses on this issue, and their testimony conflicted with each other. Defendant testified that he unequivocally invoked his right to counsel, and Detective Jones testified that defendant never made such a request. Clearly, the trial court found Jones's testimony on this point credible and did not believe defendant's claim to the contrary. Given the lack of other evidence to corroborate defendant's claim, and the fact that the trial court is entitled to gauge credibility, there is nothing in the record to give this Court a firm and definite conviction that a mistake was made in the trial court's relevant factual findings. Therefore, the trial court's factual findings were not clearly erroneous and will not be disturbed. *Burrell, supra* at 449.

Looking at the rest of the record, it is clear that defendant's references to an attorney were either in passing, such as references about how a good attorney would get him off or would tell him not to answer questions and how his sister was going to get him an attorney, or they were limited to invocations of an attorney before defendant would answer specific questions. And when defendant indicated his refusal to answer a specific question without an attorney, the detectives ceased questioning defendant on that particular question, never bringing up that topic again unless defendant brought it up first. As indicated above, the police are allowed to continue questioning in such cases, so long as they avoid the topics for which defendant had invoked a limited right of counsel, *Adams*, *supra* at 233-234, and police may question defendant about a previously foreclosed subject where the defendant himself initiates it. *Edwards v Arizona*, 451 US 477, 484-485; 101 S Ct 1880; 68 L Ed 2d 378 (1981).

Further, when detectives asked defendant if he was the shooter in the Ann Arbor robbery, this was not an improper broach of a subject defendant had requested an attorney for, because he claimed a third party had done the shooting and the question he specifically refused to answer sought the third party's name, not whether he was the shooter. Thus, there was nothing improper about the continuing interrogation of defendant by police on issues other than those specific questions defendant said he would not answer without an attorney. Therefore, defendant's Fifth Amendment right was not violated and the trial court properly declined to suppress defendant's admissions to police on that basis.

Turning to defendant's attack on the voluntariness of his statements, the factors to be considered when determining whether a statement is voluntary include:

> the age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse.
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> The absence or presence of any one of these factors is not necessarily conclusive on the issue of voluntariness. The ultimate test of admissibility is whether the totality of the circumstances surrounding the making of the confession indicates that it was freely and voluntarily made. [*People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988).]

Looking at these factors, in light of the trial court's reasonable view of the facts, it is apparent that there is no reason to conclude defendant's admissions were not voluntary. Defendant was 21 years old at the time of the interrogation, so age was not a significant factor. It was not clear whether he completed high-school, but he did attend high-school and he was described as "very intelligent and philosophical" by one of the detectives who interrogated him.

Defendant was only questioned over one day, three hours in the morning and three hours in the evening, during normal waking hours. Defendant was in custody for a few days before he was questioned, but only because he had fled to New Mexico and it was necessary for the detectives to arrange to fly down there to talk to him. Defendant was advised of his *Miranda*[2] rights.

There is no evidence on record that defendant was intoxicated, drugged, or in ill health at the time of his interrogation. There is also no evidence that he was deprived of food or sleep prior to his interrogation, and he even had a ham dinner during the second part of his interrogation. There is no evidence defendant was abused or threatened with physical abuse, and he does not claim that he was.

Defendant does not explain why the fact that he was moved to a different facility for part of his interrogation was coercive, particularly when it was done to facilitate his request to smoke. Defendant also does not explain how the subsequent destruction of the detective's notes of the interrogation would have indicated the interrogation was coercive.

In sum, looking at the totality of the circumstances, there is nothing to suggest defendant's statements to police were not voluntary, and we conclude that the trial court did not

[2] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

err when it declined to suppress the statements as involuntary.

Defendant next claims that he was denied his right to a fair trial and due process of law by the trial court's admission into evidence of the subsequent bad acts related to defendant's robbery of a Detroit gas station. We disagree.

A trial court's decision whether to admit evidence is reviewed for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). But a preliminary question of law regarding the admissibility of evidence is reviewed de novo. *Id*.

MRE 404(b)(1) sets forth the standards for the admission of other acts evidence. It provides as follows:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

Use of other bad acts as evidence of character is excluded, except as allowed by MRE 404(b), to avoid the danger of conviction based on a defendant's history of misconduct. *People v Starr*, 457 Mich 490, 495; 577 NW2d 673 (1998). However, the rule is one of inclusion, not exclusion, because only one use of character evidence is excluded, while several other permissible uses of such evidence are identified. *People v VanderVliet*, 444 Mich 52, 64; 508 NW2d 114 (1993), amended on other grounds 445 Mich 1205 (1994). Other bad acts evidence is only to be excluded based on MRE 404(b) where its value as evidence is solely to show defendant is a bad sort of person who has done, or is likely to do, a certain course of conduct based on that character. *Id*.

For evidence to be admissible under MRE 404(b), it must be offered for a proper purpose, must be relevant, and its probative value must not be substantially outweighed by its potential for unfair prejudice. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). A proper purpose is one other than showing the defendant's propensity to commit the offense. *VanderVliet*, *supra* at 74. The prosecutor has the burden of showing the evidence is relevant. *Knox*, *supra* at 509. It would be unfairly prejudicial if there is a danger that marginally probative evidence will be given undue weight by the jury. *People v Ortiz*, 249 Mich App 297, 306; 642 NW2d 417 (2001).

The first prong is whether Defendant's subsequent robbery of the Detroit gas station was entered for a proper purpose. He was seen there within one hour of the first robbery, he was seen wearing clothing matching the same description as the clothing seen worn on the perpetrator of the Ann Arbor robbery, and he was seen there in the car owned by the clerk murdered in the Ann Arbor robbery, all of which shed light on the identity of the perpetrator of the Ann Arbor robbery. Defendant's order to the clerks in the Detroit station to thank him for letting them live after he robbed the station is also relevant to identity because the request is a type of statement

one might expect from someone who just killed a clerk at another gas station for not being as cooperative as they had been. Identity is a proper purpose for the admission of other acts evidence. MRE 404(b)(1). Thus, the other bad act evidence was entered for a proper purpose.

The fact that defendant was in the Ann Arbor robbery and homicide victim's car at the Detroit robbery less than one hour later is very relevant to proving defendant's involvement in the earlier crime. His subsequent robbery of the Detroit station and his asking the cooperative clerks there to thank him for letting them live is also very relevant to the question as to whether or not defendant might be inclined to shoot someone in a robbery. It also casts strong doubt on defendant's claim that he had backed out of the Ann Arbor robbery. Thus, the second prong under *VanderVliet*, relevance, is met.

Third, the probative value of previously mentioned facts is very strong. One does not normally find an innocent explanation for a person matching the description of the perpetrator of a carjacking to be in the car stolen less than one hour later at a location about an hour's drive from the robbery. So those facts were very probative and not particularly prejudicial. The fact that defendant was also committing a robbery at that location is prejudicial, but given that it was while he was on the run from an earlier armed robbery, that prejudice does not substantially outweigh its probative value. Thus, the third prong is met. Therefore, all three prongs of the *VanderVliet* test have been met and the evidence of defendant's subsequent Detroit robbery was properly admitted by the trial court. *Knox*, *supra* at 509.[3]

Defendant also claims that manifest necessity required the trial court to *sua sponte* declare a mistrial after the jury was exposed to documents not admitted as exhibits, despite defendant's explicit statement that he did not wish to move for a mistrial. We disagree.

Defendant cites no authority that supports his position that the trial court in this situation must have declared a mistrial despite defendant's express consent to continue the trial. The authority defendant does cite only supports the contention that, if a trial court does declare a mistrial over defendant's objection, it must have been a "manifest necessity" or else double jeopardy would prevent retrial, *United States v Perez*, 22 US 579, 580; 6 L Ed 165 (1824), or addresses the standards to be used to assess whether a trial court properly denied a defendant's request for a mistrial, *People v Ortiz-Kehoe*, 237 Mich App 508, 513; 603 NW2d 802 (1999), an issue which, as noted above, defendant expressly waived. Thus, there is nothing to support defendant's contention that the trial court erred by not *sua sponte* granting a mistrial.

Because defendant has waived this issue, "[t]he submission to the jury of documents not introduced into evidence constitutes reversible error [only] if it might have operated to the substantial injury of the defendant." *People v Talley*, 56 Mich App 598, 601; 224 NW2d 660 (1974). The evidence wrongly submitted to and viewed by the jury amounted only to cell phone

[3] Further, the jury was given the proper instructions on the limited use for which evidence of the subsequent robbery could be used, and "jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

records that the trial court explicitly instructed the jury were not relevant because they were not for the cell phone defendant had on the day of the alleged crimes. Given that explanation, it is unlikely that the jury would draw any conclusions from those records that operated to the substantial injury of defendant, as "jurors are presumed to follow their instructions." *Graves, supra* at 486. Therefore, reversal is not required. Rather, defendant waived any claim of error based on this issue by expressing below that he did not want to move for a mistrial in this regard. *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002); *People v Fetterley*, 229 Mich App 511, 520; 583 NW2d 199 (1998).

Affirmed.

/s/ Christopher M. Murray
/s/ E. Thomas Fitzgerald
/s/ Donald S. Owens